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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NETANEL DRUK, Plaintiff and Appellant, v. LENNY JANNER, et al., Defendants and Respondents.	B233554 (Los Angeles County Super. Ct. No. BC444801)

APPEAL from judgments and orders of the Superior Court of Los Angeles County, Joanne B. O'Donnell, Judge. Affirmed.

Melvin Teitelbaum for Plaintiff and Appellant.

Jankielewicz & Sons and Lenny Janner for Defendants and Respondents Lenny Janner and Netzah & Jankielewicz.

Waxler Carner Brodsky and Gretchen S. Carner for Defendants and Respondents Mary Creutz and Creutz, Creutz & Derrendinger, LLP.

Wasserman, Comden, Casselman & Esensten, Leonard J. Comden, Charles A. Shultz, and Karin R. Leavitt for Defendants and Respondents Wasserman, Comden, Casselman & Esensten, Charles A. Shultz, and Rachel Zilberstein.

INTRODUCTION

Netanel Druk appeals from judgments dismissing his complaint against attorney Mary Creutz, and the law firm of Creutz, Creutz & Derrendinger LLP (the Creutz defendants), attorney Charles A. Schultz and the law firm of Wasserman, Comden, Casselman & Esensten (the WCCE defendants), and Rachel Zilberstein, following an order granting three special motions to strike the complaint under Code of Civil Procedure section 425.16. Finding no reversible error, we affirm the judgments of dismissal.[1] We also award the Creutz defendants and Rachel Zilberstein attorney fees, the amount to be determined by the trial court. Druk also appeals from several discovery orders and from an order granting a motion for an undertaking in favor of attorney Lenny Janner and the law firm of Netzah & Jankielewicz (the Janner defendants). We conclude that this part of the appeal must be dismissed, as none of the orders are directly appealable.

FACTUAL AND PROCEDURAL HISTORY

A. *Complaint*

On September 3, 2010, Druk filed a form complaint against respondents, alleging that they "misle[d] the courts as to their intent and as to the status and capacity of Syma Zilberstein," who is Druk's mother. The complaint stated three causes of action: (1) general negligence, (2) intentional tort, and (3) constructive trust; and it sought exemplary damages. The complaint is not a model of clarity, and the following description draws upon undisputed facts in other court pleadings. The complaint alleged that plaintiff is a named beneficiary of a trust established by Syma Zilberstein and her deceased husband. The trust res included a parcel of property that Syma Zilberstein purportedly sold to Nestor Lopez for a below-

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[1] All further section citations are to the Code of Civil Procedure, unless otherwise stated.

market value in 2005, while allegedly under Lopez's undue influence. On July 6, 2007, Syma Zilberstein's son, Ahron Zilberstein, on behalf of himself and as guardian ad litem for various minors, filed an action in the North Central District of the Los Angeles Superior Court to undo the sale. The Janner defendants began representing Syma Zilberstein in the summer of 2009 in this real estate action. The Janner defendants filed several pleadings and succeeded in obtaining a continuance before Ahron Zilberstein dismissed the lawsuit on April 20, 2010.

The complaint further alleged that in March of 2009, respondent Rachel Zilberstein, through her attorneys, the WCCE defendants, filed a petition for conservatorship of the estate of Syma Zilberstein on the basis that Syma Zilberstein "lacked capacity to handle her affairs," although they allegedly knew that Syma Zilberstein was "at one and the same time proceeding directly in her own capacity, through counsel in the north central district." On March 17, 2009, the Creutz defendants were appointed by the court to act as Syma Zilberstein's probate volunteer panel (PVP) attorney in the conservatorship action.

The Janner defendants did not file any document, serve any discovery, or appear in any capacity in the conservatorship action. Similarly, the WCCE defendants and the Creutz defendants did not file any document, serve any discovery, or appear in the real estate action. In addition, the sale of the real property occurred in 2005, several years before the conservatorship action was filed, and before the Janner defendants and the Creutz defendants began representing members of the Zilberstein family.

Finally, the complaint alleged that respondents "misled the court into believing that plaintiff and those similarly situated were acting in bad faith in the

north central district in suing their mother/grandmother."[2] This latter allegation is apparently based upon certain statements made by the WCCE defendants in filings with the probate court.[3]

B. *Answer and Demurrers*

On September 27, 2010, the Janner defendants filed an answer, generally denying the allegations.

On October 1, 2010, the WCCE defendants filed a demurrer to the complaint. They contended (1) the court lacked subject-matter jurisdiction, as the complaint implicated probate issues already being considered by another court, (2) plaintiff lacked standing to sue, as he was a beneficiary of a trust and not the trustee, and (3) the complaint failed to state a cause of action against the WCCE defendants, because, among other reasons, the allegations in the complaint were based on communications that were absolutely privileged under Civil Code section 47. They further contended the three causes of action in the complaint were meritless for the following reasons: (1) as to the general negligence cause of action, the WCCE defendants had no duty to a nonclient trust beneficiary; (2) as to the intentional tort cause of action, it was not pleaded with particularity; and (3) as to the constructive trust cause of action, no such cause of action existed, as a constructive trust is an equitable remedy, not a substantive claim for relief.

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[2] Syma Zilberstein passed away May 21, 2010.

[3] Throughout the complaint, plaintiff alleged claims against all of the defendants, without limiting any allegation to a specific defendant. Each defendant, however, is a separate legal entity, and plaintiff did not allege a conspiracy among the defendants. Nor was there evidence that each and every defendant committed all of the acts alleged in the complaint.

On October 21, 2010, the Creutz defendants filed a demurrer on the same grounds as stated in the WCCE defendants' demurrer. Similarly, Rachel Zilberstein filed a demurrer to the complaint on the same grounds.

C. *Special Motions to Strike under Section 425.16*

On October 28, 2010, the WCCE defendants filed a special motion to strike the complaint as a "strategic lawsuit against public participation" (SLAPP). They contended the complaint fell within the purview of section 425.16, also known as the anti-SLAPP statute, as the causes of action in the complaint arose from acts in furtherance of their constitutional right to petition, specifically, the making of allegedly misleading statements in two judicial proceedings: the real estate action and the conservatorship action. In addition, the WCCE defendants contended that Druk could not establish a reasonable probability of success as a matter of law, because there could be no tort liability for the allegedly misleading statements under the civil litigation privilege of Civil Code section 47. Finally, the motion asserted the three causes of action were meritless for the reasons stated in the demurrer.

On November 5, 2010, the Creutz defendants filed a special motion to strike the complaint on the same grounds as stated in the WCCE defendants' special motion to strike. They also contended that Civil Code section 47 absolutely protected alleged "fraudulent silence." Rachel Zilberstein filed a special motion to strike on the same grounds as stated in the WCCE defendants' special motion to strike.

Druk filed an opposition to the WCCE defendants' special motion to strike. In his opposition, Druk stated: "This action arises from the deception practiced by the defendants herein in filing in one court petitions to appoint a conservator for Syma Zilberstein because she lacked capacity to control her own affairs and at the

same time, enabling, allowing and representing her in another court to defend her sale of trust property at a price far below market value." Druk contended the special motion to strike should not be granted because the complaint did not arise out of an act of petition, but rather from a breach of the attorneys' fiduciary duties. He also contended the acts of defendants were not protected under Civil Code section 47, as the complaint alleged "malpractice against defendants for diminution of value to the trust." He further contended he had standing to bring the lawsuit as a beneficiary of the trust. In support of the opposition, Druk's attorney, Melvin Teitelbaum, filed a declaration attaching e-mails between Janner and Schultz that purported to show "the extent of the cooperation and collaboration between the attorney defendants to keep the [real estate action] going on its own, despite the fact that in [the conservatorship action] the need for Syma to have a conservator appointed was paramount."

Druk also filed an opposition to Rachel Zilberstein's special motion to strike on the same grounds as stated in his opposition to the WCCE defendants' special motion to strike. He filed an opposition to the Creutz defendants' special motion to strike on substantially the same grounds as stated in his two other oppositions.

The WCCE defendants filed a reply, arguing that the instant action was not a malpractice action. They contended that Druk was not a former client of WCCE. They further contended that Druk had not demonstrated a probability of prevailing on the merits.

Rachel Zilberstein filed a reply on substantially the same grounds as stated by the WCCE defendants. She also stated that she was not an attorney. The Creutz defendants also filed a reply, arguing that they did not represent Druk, and that Druk had produced no admissible evidence demonstrating that he could

prevail on the merits of his claims. Rachel Zilberstein and the Creutz defendants also sought attorney fees under section 425.16.

On May 26, 2011, the superior court granted all three special motions to strike. The court ruled that the gravamen of the complaint concerned "defendants' filing of the conservator action and statements . . . made in that matter." The court also determined that Druk could not meet his burden of establishing a probability of prevailing on the merits of his claims. The court found that neither Rachel Zilberstein nor the WCCE defendants nor the Creutz defendants represented Druk. Thus, they did not owe a duty to him. In addition, the court ruled that the defendants' statements were absolutely privileged. The demurrers were taken off calendar as moot. The court entered judgments dismissing the complaint with prejudice, and awarded attorney fees and costs to the parties.

D. *Discovery Motions and Motion for an Undertaking*

On November 22, 2010, the Janner defendants filed three motions: (1) a motion to lift the discovery stay in place because of the special motions to strike, (2) a motion to compel responses to pending discovery requests, and (3) a motion for an undertaking. As to the discovery motions, the Janner defendants contended: (1) there was good cause to lift the discovery stay, as the Janner defendants were not involved in any of the special motions to strike, and Druk had received the benefit of discovery from the Janner defendants while refusing to respond to discovery requests filed prior to the special motions to strike; and (2) discovery should be compelled because the International Hague Convention rules of discovery did not apply to bar the discovery requests, as the Janner defendants sought only evidence located in the State of California. As to the motion for an undertaking, the Janner defendants contended that under section 1030, Druk should

be required to file an undertaking, as Druk was not a resident of California, and the Janner defendants had shown a reasonable probability of prevailing at trial.

On May 11, 2011, Druk filed untimely oppositions to each of the three motions. The Janner defendants filed replies to the oppositions, addressing the merits but arguing additionally that the court should not consider the untimely oppositions.

On May 19, 2011, the superior court granted all three motions. The court exercised its discretion not to consider the oppositions to the motions, as they were untimely. The court found good cause to lift the discovery stay, ordered that Druk respond to discovery requests from the Janner defendants, and ordered Druk to post a security bond in the amount of $10,200 because the Janner defendants had shown a reasonable possibility of prevailing in the action.

E. *Notice of Appeal*

On June 6, 2011, Druk filed a notice of appeal under sections 425.16, subd. (i) and 904.1. He stated that he was appealing from the May 19, 2011 order granting the Janner defendants' three motions, and from the May 26, 2011 order granting the three motions to strike. Although Druk did not state he was appealing from the judgments of dismissal, we will exercise our discretion to construe his notice of appeal to encompass those judgments, as they are the direct result of the order granting the special motions to strike.[4]

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[4] We note that appellant's opening brief is in violation of California Rules of Court, rule 8.204, as it is practically devoid of record citations, and does not provide a statement of appealability or a fair statement of the facts. In addition, the appellate brief contains undeveloped arguments that are not supported by any case citation. We decline to address those arguments. (See *Diamond Springs Lime Co. v. American River Constructors* (1971) 16 Cal.App.3d 581, 608 [point raised without legal analysis or authority is forfeited].)

DISCUSSION

A. *Appeal from Order in Favor of the Janner Defendants*

As an initial matter, this court must determine whether it has jurisdiction to consider an appeal. The Janner defendants contend the order granting their discovery motions and their motion for an undertaking are not appealable. We agree.

"Generally, discovery orders are not appealable." (*H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 885; see also § 904.1 [discovery orders not included as appealable orders].) Appellant has presented no argument as to why the instant discovery orders should be reviewed by this court. For example, he has not requested that this court exercise its discretion to construe the notice of appeal as a petition for an extraordinary writ. (*H.B. Fuller Co. v. Doe*, *supra*, at p. 886.) Similarly, "[a]n order granting or denying a motion for an undertaking . . . is not appealable." (§ 1030, subd. (g).) While an order granting a motion for an undertaking may be reviewed by means of a writ, see, e.g., *Yao v. Superior Court* (2002) 104 Cal.App.4th 327, appellant did not proceed by means of a writ in this case. Nor has he argued that this court should exercise its power to consider his notice of appeal as a petition for an extraordinary writ. In addition, we see no reason to exercise our discretion. Thus, Druk's appeal from the May 19, 2011 order in favor of the Janner defendants must be dismissed.

B. *Special Motions to Strike under Section 425.16*

Appellant also appeals from the order granting the three special motions to strike. This court has jurisdiction over this part of the appeal, as section 425.16, subdivision (i) explicitly provides that "[a]n order granting or denying a special motion to strike shall be appealable under Section 904.1." Likewise, the judgments of dismissal are appealable under section 904.1 as final judgments.

In considering the appeal, this court independently reviews the superior court's order granting the special motions to strike. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) We accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).)

A court should grant a special motion to strike a cause of action if it (1) arises from protected speech or petitioning and (2) lacks even minimal merit. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) The party bringing the special motion to strike has the initial burden of showing that the cause of action arises from protected speech or petitioning. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Once the moving party has met its burden, the burden shifts to the nonmoving party to demonstrate minimal merit, i.e., that there is a probability of prevailing on the cause of action. (*Ibid*.)

Here, the superior court determined that the defendants who brought the special motions to strike met their burden of showing that the causes of action in the complaint arose from protected petitioning. We agree.

Section 425.16 protects "any act . . . in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1).) Such acts include "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . . ." (§ 425.16, subd. (e)(2).) Thus, "statements, writings and pleadings in connection with civil litigation are covered by [section 425.16], and that statute does not require any showing that the litigated matter concerns a matter of public interest. [Citations.]" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.)

The gravamen of all three causes of action in Druk's complaint is that the moving defendants failed to inform the court in the conservatorship action that Syma Zilberstein had retained counsel and was defending herself in the real estate action. Defendants' alleged failures to inform the superior court are communicative acts made in connection with civil litigation. Thus, the complaint arose from protected petitioning.

Druk contends that defendants' acts were outside of the scope of section 425.16, as their acts were fraudulent or unlawful as a matter of law, citing *Flatley*, *supra*, 39 Cal.4th 299. In *Flatley*, the California Supreme Court held that "where a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Id*. at p. 320.) *Flatley* is inapposite here, because the defendants have denied that their conduct was fraudulent or unlawful, and appellant's allegations do not establish that the acts were fraudulent or unlawful as a matter of law. At best, the allegations in the complaint show that the defendants involved with the conservatorship action believed that Syma Zilberstein needed a conservator, whereas Syma Zilberstein or the Janner defendants did not believe she needed a conservator.

Appellant also contends his complaint is a malpractice action, which removes defendants' statements from the scope of section 425.16. (See *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1540 [because the claims of defendant's former clients arose from defendant's alleged legal malpractice and not from protected petitioning activity, the claims are outside the

scope of the anti-SLAPP statute].) We construe appellant's argument to be that he could and did bring a malpractice claim against the moving defendants. The complaint, however, does not allege a malpractice claim, and even if it could be amended to do so, appellant cannot show that he was a former client of the moving defendants. First, Rachel Zilberstein is not an attorney, and thus, there can be no malpractice claim against her. Second, the WCCE defendants represented only Rachel Zilberstein in the conservatorship action; they did not represent the trust or its trustee, Syma Zilberstein. Finally, although the Creutz defendants did represent Syma Zilberstein under appointment by the probate court, there is no evidence that the probate court, Syma Zilberstein or the Creutz defendants intended Druk to benefit from the rendered legal services. (See *Zenith Ins. Co. v. O'Connor* (2007) 148 Cal.App.4th 998, 1008 [essential predicate for establishing an attorney's duty of care to an intended beneficiary is that both the attorney and the client intended plaintiff to be the beneficiary of the legal services rendered].) Thus, defendants' statements fall within the scope of section 425.16.[5]

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[5] Appellant contends he has standing to bring a malpractice action against the attorneys as he is a beneficiary of the trust, citing *Harnedy v. Whitty* (2003) 110 Cal.App.4th 1333. We disagree. Aside from the fact that he has not brought a malpractice action, *Harnedy v. Whitty* is factually distinguishable. In *Harnedy v. Whitty*, the appellate court held that "when the claim being asserted rests in whole or in part on alleged breaches of trust by the trustee, a beneficiary has standing to pursue such a claim against either (1) the trustee directly, (2) the trustee and third parties participating in or benefiting from his, her or its breach of trust, or (3) such third parties alone." (*Id*. at pp. 1341-1342, italics omitted.) The instant complaint does not rest in whole or in part on alleged breaches of trust by Syma Zilberstein. Rather, the gravamen of the complaint is alleged fraud by the defendants, none of whom are trustees. Thus, appellant does not have standing to bring a malpractice claim against the moving defendants.

Because the moving defendants have met their initial burden of showing that the causes of action in the complaint arose from protected activity, the burden shifts to Druk to demonstrate that he would prevail on the merits of his claims. After independently reviewing the evidence, we conclude that he has produced no admissible evidence to establish that the causes of action in his complaint have even minimal merit. Defendants' acts are absolutely privileged under Civil Code section 47, as communicative acts made in connection with a judicial proceeding. The fact that the communicative acts consisted of alleged failures to inform the trial court of Syma Zilberstein's actions in another case does not assist Druk, as those acts are also privileged under Civil Code section 47. (*See Forro Precision, Inc. v. International Business Machs. Corp*. (9th Cir. 1984) 745 F.2d 1283, 1285 [civil litigation privilege under section 47 applies to "selective failure to disclose information"].)[6]

Druk contends he is likely to prevail based upon the undisputed facts that "defendants presented in one court that Syma [Zilberstein] required a conservator to handle her affairs . . . while at the same time working with co-defendants [the Janner defendants] to maintain the [real estate] action." We disagree, as defendants' acts are absolutely privileged under Civil Code section 47. Thus, there can be no tort liability for those acts.

Finally, Rachel Zilberstein and the Creutz defendants request that in the event they prevail on appeal, this court should award appellate attorney fees. We agree that these respondents are entitled to appellate attorney fees. (See § 425.16, subd. (c)(1) ["[A] prevailing defendant on a special motion to strike shall be

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[6] For the reasons stated previously, we reject appellant's unsupported claim that because his complaint was a malpractice action, respondents' acts should not be shielded by the civil litigation privilege.

entitled to recover his or her attorney's fees and costs."]; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500 [because § 425.16, subd. (c) authorizes an attorney fee award to a prevailing party without precluding appellate attorney fees, those fees are recoverable].)

DISPOSITION

The appeal as to the discovery motions and the motion for an undertaking is dismissed. The order granting the special motions to strike and the judgments of dismissal thereupon are affirmed. Respondents are awarded their costs on appeal; Rachel Zilberstein and the Creutz defendants are also awarded their attorney fees on appeal. The trial court shall determine the amount of fees and costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.